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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 783

FLORIDA EAST COAST RAILWAY COMPANY,
a Corporation, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

## CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 29, 1965

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The Florida East Coast Railway Company prays that in the event the United States of America petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on July 21, 1965, a writ of certiorari issue to review the questions presented and arguments advanced herein by your cross-petitioner.

## CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, dated July 21, 1965, is not printed herein as it is printed in an Appendix to the Petition filed herein by the United States, and at page 904 of the Record herein, and is reported at 348 F. 2d 682. The Findings of Fact and Conclusions of Law of the United States District Court for the Middle District of Florida are printed in the Joint Appendix prepared for the use of the Court below (R. 180), and are unofficially reported at 57 LRRM 2618. The preliminary injunction appealed by both petitioner and cross-petitioner to the Court of Appeals is printed in the Joint Appendix prepared for the use of the Court below (R. 189).

## JURISDICTION

The judgment of the Court of Appeals entered on July 21, 1965, is not printed herein as it is printed in an Appendix to the Petition filed herein by the United States and at page 915 of the Record herein. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).[1]

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[1] Mr. Justice Black issued orders which as amended, granted all parties to this cause an extension of time to November 29, 1965, in which to file for a writ of certiorari. Mr. Justice Black's order relating to the extension of time in favor of all parties was: "Motion granted if within my power to do so." In any event this Court has jurisdiction to hear and determine the questions raised by cross-petitioner herein: *Zimmern* v. *United States*, 298 U.S. 167, 169-70 (1936); *American Trucking Ass'n* v. *Frisco Transportation Co.*, 358 U.S. 133, 145 (1958); *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947); *Langnes* v. *Green*, 282 U.S. 531, 538 (1938); *Public Service Commission* v. *Havemeyer*, 296 U.S. 506, 509 (1936). Cf. *Cresswell* ex rel. *Di Pierro* v. *Tillinghast*, 286 U.S. 560 (1932).

## QUESTIONS PRESENTED[2]

(1) While railroad labor organizations were engaged in a strike against a railroad after all procedures established by the Railway Labor Act had been exhausted by all parties concerned, did the Railway Labor Act compel the railroad to comply with collective bargaining agreements with the striking labor organizations in limitation of the right of the railroad to resort to self-help?

(2) Inasmuch as the National Railroad Adjustment Board was established by the Railway Labor Act as the forum for the adjudication of disputes arising out of the interpretation or application of collective bargaining agreements, did the District Court in the first instance have jurisdiction to hear and determine disputes concerning the interpretation or application of collective bargaining agreements and to require that the railroad comply with such agreements during the strike

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[2] In the event a writ of certiorari is granted, cross-petitioner reserves the right to argue as it did in the Court below (1) that while railroad labor organizations are engaged in a strike against the railroad, and by law may not be compelled to perform the collective bargaining agreements, specific performance of such agreements may not be granted against the railroad alone; (2) that the United States of America has no standing to bring a suit for injunctive relief against a railroad where it does not allege any actual interference with or obstruction to interstate commerce and where, although it alleges a threat of interference with interstate commerce said to be created by violations of the Railway Labor Act, the factual situation is that the alleged violations are intended to maintain the flow of commerce; (3) that the union shop agreements with the striking labor organizations were rendered unenforceable as to the employees working for the railroad during the period of the strike by reason of said labor organizations' failure to offer membership therein on non-discriminatory terms to the aforesaid employees. Railway Labor Act, Section 2. *Eleventh*, 45 USC § 152, Eleventh.

period except upon specific advance authorization of the District Court after a finding of reasonable necessity for temporary noncompliance therewith?

## STATUTE INVOLVED

*The Railway Labor Act,* 45 U.S.C. §§ 151-163.

The text of the Railway Labor Act, Section 2. (1), (4), (5), *First,* and *Seventh;* Section 3. *First* (i); Section 5. *First;* and Section 6., being lengthy, is set out in the Appendix hereto.

## STATEMENT OF THE CASE

On January 23, 1963, after they had rejected arbitration, eleven cooperating non-operating labor organizations representing crafts or classes of employees of the Florida East Coast Railway Company (hereafter, "FEC" or "the railroad") struck the property of FEC over a wage demand as to which the procedures of the Railway Labor Act had been exhausted (R. 239, 250). The same organizations were intervenors in the Court below. All other labor organizations representing FEC employees, including the operating organizations, respected intervenors' picket lines, and FEC was forced first to shut down operations, and then to operate the railroad with supervisory personnel in order to get back into business (R. 353, 394-96).

Because of the lack of manpower, the railroad could not, in resuming operations, comply with the agreements in effect before the strike. The strike compelled the railroad to use the manpower and skills available to it. As a result, various classes of work had to be consolidated and rates of pay differed somewhat from the rates set forth in the agreements (R. 287-88, 293, 294, 352). In general, the rates paid were not less than the rates under the agreements in effect prior to the

strike (R. 357-58). The primary difference was that, because of the shortage of manpower, employees had to be worked across craft lines and seniority districts, and supervisors had to perform some of the work which would ordinarily have been performed by one or another of the crafts (R. 328, 329, 330, 358, 359).

In spite of a vigorous hiring program, it proved difficult for the railroad to obtain trained employees due to the strike (R. 672-74, 685-87, 695-96, 702, 712-14, 723-24, 740, 778-80, 782-83, 785-87). The railroad was compelled to hire relatively unskilled personnel to do skilled jobs, which necessitated lengthy on-the-job training of said employees by supervisory personnel, use of supervisory or exempt personnel to do the necessary work in the interim, and use of employees across craft lines (R. 661-62, 666-67, 672-74, 685-86, 687, 714, 724, 744, 753, 761, 763-64, 773, 775-76, 777, 782, 783, 785, 786). This shortage of personnel has persisted up to the present time.[3]

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[3] In 1963, FEC took three actions with respect to employment conditions on the railroad:

(1) on September 1, 1963, it reduced to writing the temporary practices which had grown up under strike conditions in a document entitled "Conditions of Employment" which was distributed to all employees and which was intended to be a guide to temporary conditions prevailing during the strike period (R. 288, 289-90, 293, 294, 295, 296, 302, 1004);

(2) on July 31, 1963, it issued a Section 6 Notice to eighteen labor organizations proposing cancellation of existing union shop agreements. The labor organizations, including intervenors, refused to negotiate on August 29, 1963, and on September 9, 1963, FEC notified the organizations that it was cancelling the union shop agreements because they had refused to negotiate (R. 1310, 1312-13);

(3) on September 24, 1963, it issued a Section 6 Notice proposing adoption of a "Uniform Working Agreement" as an

On April 30, 1964, the United States of America (hereinafter "the U.S." or "the Government") filed a complaint for injunctive relief and a motion for preliminary injunction in the United States District Court for the Middle District of Florida, alleging that the railroad had by its acts and conduct violated the provisions of the Railway Labor Act (R. 2-15). The eleven striking labor organizations were permitted to intervene as parties plaintiff. In substance, the complaints of the U.S. and intervenors alleged that FEC had not operated in accordance with the various collective bargaining agreements in effect prior to the strike and that under the Railway Labor Act, no change or deviation from any agreement was permissible, notwithstanding a strike.

The preliminary injunction granted by the District Court on October 30, 1964, directed FEC, *inter alia,* to reinstate and maintain the rates of pay, rules and working conditions contained in existing collective bargaining agreements with intervenors. The affirmance by the Court of Appeals of this portion of the order is challenged hereby.

The preliminary injunction provided also that the railroad was enjoined from making any unilateral changes in employment conditions without *prior* permission of the District Court, but was authorized to make application to that Court for permission to adopt employment practices deemed necessary to enable it to operate under strike conditions: see *Florida East Coast*

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amendment to existing collective bargaining agreements (R. 965-1003). When intervenors again refused to bargain or to confer with respect to this notice because of the presence of a court reporter, FEC on October 30, 1963, attempted to put this notice into effect (R. 1371-1374). The implementation of the aforesaid three actions by the railroad, which was enjoined by the District Court, is not in issue here.

*Railway Company* v. *Brotherhood of Railroad Trainmen,* 336 F. 2d 172 (1964), *cert. denied,* 379 U.S. 990 (1965). In accordance with this provision, FEC applied for permission to adopt certain employment practices. This application was denied in part and granted in part by order of the District Court dated December 3, 1964.

Following timely appeal by the railroad and cross-appeal by the United States from the order entered on October 30, 1964, granting a preliminary injunction and from the order entered on December 3, 1964, granting in part and denying in part approval of employment practices, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on both the appeal and the cross-appeal, on the authority of the Court's prior decision in *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen, supra.*

## ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

Petitioner relies upon the following reasons why the petition for a writ of certiorari sought herein should be granted if the United States petitions for such a writ:

### A. After a Strike Occurs, the Railway Labor Act Does Not Require Adherence to Collective Bargaining Agreements With Striking Unions; and the Contrary Decision of the Court Below Conflicts With Applicable Decisions of This Court

Eleven cooperating non-operating unions, following their rejection of arbitration, struck the railroad on January 23, 1963, over a dispute as to which all Railway Labor Act procedures had been exhausted. The railroad was forced first to cease operations and then to resume operations with supervisory personnel.

The employees' resort to self-help empowered the railroad to resort to self-help in its turn, and to attempt to maintain its operations in any peaceable way it saw fit, *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963). No legislative or judicial policy to the contrary exists, nor is there statutory basis for holding that the railroad was legally required to comply with collective bargaining agreements with the striking labor organizations during the period of the strike, or that the railroad's right to self-help could be limited by a District Court sitting to determine which of its proposed *modi operandi* during the strike were "reasonably necessary to enable it to effectuate its right to operate . . .".[4] No such limitations or restrictions on the striking labor organizations existed or have been found to exist here; once the Railway Labor Act's procedures were exhausted as to the dispute which gave rise to the strike, the Act did not apply in any way to limit the unions' conduct of the strike, or their control over its duration. The idea that a struck carrier does not possess the same freedom to conduct its own operations once the Act's procedures have been exhausted as to the dispute which gave rise to the strike, besides being obnoxious to elementary fairness, is in direct conflict with the decisions of this Court defining and explaining national labor policy in respect to employer self-help during the period of a strike.

Clearly, the FEC's right to resort to self-help could have been terminated at any time by the unions. Calling off the strike would have reinstated fully the effectiveness of the agreements and compelled FEC to adhere strictly to them. This unquestioned right is a

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[4] *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 336 F. 2d 172 at p. 182 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965).

sufficient protection to the labor organizations involved against the railroad's seeking to prolong a strike for the advantage it might gain thereby. Conversely, the railroad's use of self-help while the strike continues accomplishes a basic objective of the Railway Labor Act, *viz.* the continuance of the flow of commerce (Railway Labor Act § 2. (1)).

Basic national labor policy entitles an employer faced by a strike to dispense with complying with collective bargaining agreements with the striking unions. No one would suggest that an employer subject to the National Labor Relations Act (NLRA), in order to implement the right of self-help, would be required to have an *a priori* determination of a District Court to justify its temporary "deviations" from said agreements or that it could be compelled to show that such deviations were necessary to enable it to remain in operation during the strike. Such a doctrine robs the employer of the use of economic weapons in defense against a strike and can not be supported in view of this Court's decisions in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938); *N.L.R.B.* v. *Erie Resistor Corp.,* 373 U.S. 221 (1963); and *N.L.R.B.* v. *Insurance Agents International Union,* 361 U.S. 477 (1960), holding (in the words of Mr. Justice Brennan):

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized . . . ."[5]
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> * * *
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> ". . . There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also

[5] 361 U.S. 477 at p. 489.

impliedly declared these tactics unlawful as a matter of federal law.'"[6]

Yet, the Court of Appeals held that limitations upon employer self-help must be presumed to exist under the Railway Labor Act. In so holding, it not only ignored the legislative history of the Act, but put itself into direct conflict with this Court's decision in *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, *supra*, which held that exhaustion of the Act's provisions permits railroad carriers to resort to self-help just as it permits railway labor organizations to strike.

The doctrine that a strike or other legal impasse in labor relations permits "the legitimate use of any economic weapon by an employer" has been upheld by this Court as recently as last term in *N.L.R.B.* v. *Brown*, 380 U.S. 278, 286 (1965); *American Shipbuilding Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965) and *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965), and is entirely consistent with the Railway Labor Act as interpreted by the Court in the *B. & O. R. Co.* case, *supra*, and as interpreted by the National Railroad Adjustment Board in a series of decisions.[7] The mis-

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[6] *Ibid.*, at p. 495.

[7] *Brotherhood of Railway Trainmen and Kentucky and Indiana Terminal Railway Company*, National Railroad Adjustment Board, First Division, Award No. 17,055 (1955); *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and Macon, Dublin & Savannah Railroad Company*, National Railroad Adjustment Board, Third Division, Award No. 10,197 (1961); *Brotherhood of Maintenance of Way Employees and St. Louis Southwestern Railway Company*, National Railroad Adjustment Board, Third Division, Award No. 5042 (1950); *Brotherhood of Maintenance of Way Employees and Missouri Pacific Railroad Company*, National Railroad Adjustment Board, Third Division, Award No. 5074 (1950); *Order of Railway Conductors and Boston and Maine Railroad*, National Railroad Adjustment Board, First Division, Award No. 13,341 (1950).

reading of the Railway Labor Act by the Court of Appeals below which equates the *permanent* "changes" in collective bargaining agreements forbidden by Section 2. *Seventh* of the Act with *temporary,* strike-induced changes in operating practices (which have no effect at all on the agreements as applicable upon termination of the strike) represents a frontal attack on this basic national policy and on the doctrine of the *B. & O. R. Co.,* case, *supra.* It is respectfully submitted that this attack should be rejected, and that the right of a railroad employer to combat a strike with the economic weapons at its disposal should be confirmed by this Court.

**B. Whether or Not the Court Below Was Correct in Its Holding That a Struck Railroad Is Required by the Railway Labor Act To Comply With Collective Bargaining Agreements With the Striking Unions Unless Non-Compliance Is Reasonably Necessary to Maintenance of Operations. Primary Jurisdiction Over the Subject Matter Is in the National Railroad Adjustment Board**

Under the Railway Labor Act, disputes "concernings changes in rates of pay, rules, or working conditions not adjusted by the parties in conference"[8] are referable to the National Mediation Board and processed through the procedures of Section 6 of the Act (and, if necessary, Section 10 as well). Disputes "arising out of grievances *or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions*"[9] are referable to the National Railroad Adjustment Board under Section 3. of the Act, and in effect, are subject to compulsory arbitra-

[8] Railway Labor Act, Section 5. *First* (a).

[9] *Ibid.*, Section 2. *Sixth.* (Emphasis supplied)

tion: *Virginia R. Co.* v. *System Federation,* 300 U.S. 515 (1937); *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U.S. 711 (1945). It would seem obvious that *if* a carrier must comply with agreements during a strike by the union parties thereto, and that *if* a dispute arises as to whether the carrier is correctly applying the agreements during the period of the strike, exclusive, primary jurisdiction as to such a dispute should lie in the Adjustment Board. Changes in operating practices introduced by a railroad to meet strike conditions may or may not be in compliance with existing agreements; they are not intended to *change* agreements, and hence cannot be subject to the provisions of Section 6.[10]

Whence, then, does the District Court derive authority to adjudicate in advance the propriety of temporary non-compliance with agreements? The answer is hard to determine, since neither the Court below nor the Court which decided the *Trainmen* case, *supra,* explained the basis of the District Court's authority to supervise the operations of a strike-bound railroad carrier. The Court below apparently felt that the District Court had general jurisdiction in equity to exercise such a supervisory power. A District Court cannot in the exercise of its general jurisdiction in equity require specific performance by one party to a collective bargaining agreement (the railroad) while the other party to the agreement (the union) is not performing and may not by law be compelled to perform while engaging in a lawful strike. Moreover, as pointed out in Argument A., *supra,* the Court lacked such power because the railroad was free

[10] The two instances in which FEC *did* attempt to change existing agreements, the railroad's Section 6 notices of July 31, 1963 and September 24, 1963, are not before the Court.

to resort to self-help and the provisions of the Railway Labor Act did not require compliance with the agreements under strike conditions. *But, even if the Act be applicable, the remedy at law of any employees injured by the railroad's non-compliance with existing agreements is complete and adequate—it is an action before the Adjustment Board.*

Cross-petitioner therefore submits that the District Court had no jurisdiction to hear and determine charges of non-compliance with the agreements. Rather, such jurisdiction belonged to the Adjustment Board under the Railway Labor Act. This Court should exercise its supervisory power over the Federal Courts to correct this unwarranted grant of power to the District Court.

**C. If the Petition for a Writ of Certiorari of the United States Is Granted This Court Should Consider and Decide the Questions Presented by This Cross-Petition**

On appeal below, the Government argued that the District Court (and, hence, the Court of Appeals in the *Trainmen* case) had erred in prospectively permitting the railroad to make application for approval of "reasonably necessary" employment practices, since in the Government's view the language of Section 2. *Seventh* of the Railway Labor Act is absolute, and requires a carrier to comply unconditionally with all collective bargaining agreements, even during a strike called by the labor organization parties thereto. The railroad, on the other hand, contended that the legislative history of the Railway Labor Act, this Court's holding in the *B. & O. R. Co.* case, *supra,* and common sense demonstrate that the Act was not intended to compel employers to comply with collective bargaining agreements with striking labor organizations any more

than it was intended to prohibit labor organizations from striking; and, that to require compliance with collective bargaining agreements during the temporary period of a strike nullifies the employer's right to resort to self-help as confirmed and defined by this Court. *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co., supra; N.L.R.B.* v. *Mackay Radio & Telegraph Co., supra; N.L.R.B.* v. *Erie Resistor Corp., supra; N.L.R.B.* v. *Brown, supra; American Shipbuilding Co.* v. *N.L.R.B., supra;* and *Textile Workers* v. *Darlington Mfg. Co., supra.*[11]

In fairness to the integrity of its own reasoning processes, this Court should not grant the Government's petition for certiorari without also determining to consider the questions presented herein. The Government believes that the decision of the Court below writes an unwarranted "exception" into the Act; the railroad believes that the Act was not intended to require even conditional compliance with agreements with striking labor organizations, and in any event that the proper forum for adjudication of charges of non-compliance is the National Railroad Adjustment Board rather than the District Court.

If the question of the applicability of Section 2. *Seventh* and Section 6. of the Act to a railroad carrier's

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[11] It is uncontroverted that after the strike began, the railroad did not have enough manpower to comply with the agreements, and physically could not have complied with the agreements. Even the labor organizations conceded this point in *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen, supra,* 336 F. 2d 172, 181 and in oral argument below. The position of the United States is that if a railroad cannot obtain enough personnel to comply with the written agreements, it must go out of business or knuckle under to the union demands. Even the labor organizations involved have shied away from making such an extreme contention.

operations during a strike is to be examined by the Court, the Court should consider the entire issue, and decide whether the Act applies in such circumstances unconditionally (as the Government maintains), conditionally (as the Court of Appeals held) or not at all (as the railroad believes).

## CONCLUSION

Cross-petitioner prays, for the foregoing reasons, that the Court should review the questions presented herein.

Respectfully submitted,

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November 29, 1965

# APPENDIX

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### Railway Labor Act, 45 U.S.C. §§ 151-163

Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (45 U.S.C. § 152 (1), (4), (5))

*First.* It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. (45 U.S.C. § 152, First)

. . .

*Seventh.* No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act. (45 U.S.C. § 152, Seventh)

Sec. 3. *First.* There is hereby established, a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

. . .

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements

concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. (45 U.S.C. § 153, First (i))

Sec. 5. *First.* The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this Section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed

and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose. (45 U.S.C. § 155, First)

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipts of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board (45 U.S.C. § 156)

# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 783

FLORIDA EAST COAST RAILWAY COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES

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The cross-petition for a writ of certiorari raises issues closely connected with the question presented in the petition for certiorari filed by the United States in this case on November 29, 1965 (No. 782, October Term, 1965).[1] Accordingly, the United States acqui-

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[1] A petition for a writ of certiorari was also filed by the intervening unions on November 18, 1965, *Brotherhood of Ry. and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO, et al.* v. *Florida East Coast Ry. Co.*, No. 750, October Term, 1965.

esces in the granting of the cross-petition if the Court grants the petition in No. 782 and if the Court concludes that the cross-petition was timely. [2]

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General.*

DECEMBER 1965

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[2] The cross-petition was filed on November 29, 1965, more than 90 days after the entry of the judgment of the court of appeals. However, on October 15, 1965 (the 86th day), Mr. Justice Black extended the time within which the United States might petition for certiorari to and including November 18, 1965. Subsequently, after the expiration of the original 90-day period and upon the application of cross-petitioner, Mr. Justice Black amended this extension order to apply to all parties "if within my power to do so." On November 18, 1965, Mr. Justice Black further extended the time within which the United States and cross-petitioner might petition for certiorari to and including November 29, 1965.

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